Supreme Court, U.S.
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In The

Supreme Court of the United States

KEVIN L. HINSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

MR. ROGER L. FALK, KS Sp. Ct. # 09972
LAW OFFICE OF FALK & COTTON, P.A.
301 West Central Avenue
Wichita, Kansas 67202
Telephone: (316) 265-5115
Facsimile: (316) 265-5183
roger_falk@sbcglobal.net
Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the district court committed plain error in admitting the hearsay testimony of Detective Hamilton, that a year before she met Mac Pingry she was told that a white male named Kevin was Pingry's methamphetamine supplier, and this error is so prejudicial as to require reversal of his convictions herein.

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OPINION BELOW

The Tenth Circuit Court of Appeals published this opinion in the Federal Reporter. The decision is reported at 585 F.3d 1328. The District Court did not publish an opinion in this case. There were no pertinent rulings from the bench.

JURISDICTION

The Tenth Circuit filed its decision on November 3rd, 2009. There was no motion for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari.

STATUTORY PROVISIONS INVOLVED

6th Amendment to the United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Rule 801(c) of the Federal Rules of Evidence:

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

STATEMENT OF FACTS

The petitioner, Kevin L. Hinson, was indicted in the United States District Court for the District of Kansas on charges of Conspiracy to Distribute Methamphetamine in violation of 21 U.S.C. § 846, Possession with Intent to Distribute Methamphetamine in violation of 21 U.S.C. § 841(a)(1), Use of a Communication Facility to Commit a Drug Trafficking Crime in violation of 21 U.S.C. § 843(b), and Distribution of Methamphetamine in violation of 21 U.S.C. § 841(a)(1). After a jury trial in which Hinson was convicted of all counts, Hinson was sentenced to 240 months imprisonment on counts 1, 2, and 4 and 48 months on count 3.

Undercover officers with the Wichita Police Department, Kevin Real and Sarah Hamilton, suspected that Mac Pingry was a methamphetamine dealer. On November 10th, 2005, officers executed a search warrant at Pingry's home and found methamphetamine and marijuana, including some high grade marijuana called "killer bud." While the search was being executed, Detective Real interrogated Pingry at the police department. Before Detective Real could

inform Pingry of his *Miranda* rights, Pingry asked if Real wanted him to make some controlled buys. Pingry told Real of his drug dealings, stating that he usually sold methamphetamine by the quarter pound and half pound at the rate of $1,000 per ounce. Pingry had a buyer who purchased three-quarters of a pound of methamphetamine for $12,000 every week to ten days. Pingry estimated that he had sold 70 pounds of methamphetamine over the past year and a half.

Pingry named Kevin Hinson as his supplier. Pingry provided a phone number and a description of Hinson's residence and truck. Pingry stated that he always paid cash when purchasing drugs from Hinson. When Pingry wanted to buy a quarter pound he would tell Hinson "I need one" for which the price would be $3,250. For the purchase of a half pound, Pingry would say "I need two." To do a deal, they usually met at Pingry's residence, car washes, or auto parts stores.

On November 16th, 2005, Pingry placed a recorded telephone call to Hinson arranging to meet at an auto parts store "just for one." After placing the call, Pingry told Detective Real the name and location of the store referred to in the phone conversation. Before making the buy, Pingry was strip searched, and his car was searched for cash and drugs. Real provided Pingry with $3,250 of buy money that had been photocopied to record the serial numbers. Pingry wore a body wire, and a camera was placed in his vehicle to obtain video of the front passenger's seat.

Pingry was told to have Hinson get in Pingry's vehicle so that the transaction could be recorded. Detective Paul Nicholson ran a surveillance video of the transaction from a vehicle in the store parking lot.

Pingry drove to the auto parts store and parked in the lot. Pingry moved his car to a different parking space. He got out of the car and opened the trunk as if looking for something. Hinson arrived in a white truck and parked beside Pingry. Hinson got out of the truck, looked at Pingry, and then both men got into Hinson's truck. Pingry returned to his car and drove to a QuikTrip followed by Detective Real. Real got into Pingry's car and saw a plastic baggie containing four small baggies of methamphetamine on Pingry's lap. Real took custody of the drugs, and he and Pingry returned to the police department where Pingry and his vehicle were again searched. Pingry did not have the $3,250 of buy money he had been provided.

Following the controlled buy, Pingry did not stay in contact with the police. About a month later, Detectives Real and Hamilton found Pingry, who had moved without informing them. Pingry had been using methamphetamine. The following day, December 14th, 2005, Pingry went to the police department, but claimed he could not do another controlled buy on that date because he had promised to do something with his wife.

The police decided to stop Hinson for a traffic violation. Officers waited outside Hinson's home until he left. Officers were instructed to follow Hinson and,

if he committed a traffic violation, to arrest him. While conducting surveillance and listening to his police radio, Detective Thomas Krause heard Detective Nicholson say that he had seen Hinson commit two traffic violations. Krause claimed he did not stop Hinson because his vehicle did not have emergency equipment. Krause followed Hinson to a post office where he went inside for a few minutes. After leaving the post office, Krause followed Hinson to a Subway restaurant where he ate lunch. Hinson failed to use a turn signal as he was leaving Subway.

After leaving the restaurant, Hinson was eventually stopped by Officer Robert Dickerson. Dickerson had been instructed that Hinson had "traffic charges on him" and should be arrested. Although Dickerson did not observe Hinson commit a traffic violation, he arrested Hinson. Hinson's truck was seized and searched. Krause found a shoe box containing $39,940 on the back seat of Hinson's truck. The shoe box did not contain any of the buy money used in the controlled buy on November 16th, 2005. Three receipts for money orders were found in Hinson's truck. The police recovered a cell phone and $3,208 in cash from Hinson.

On April 4th, 2007, Hinson was indicted on one count of distribution of methamphetamine. On June 26th, 2007, a grand jury returned a Superseding Indictment charging Hinson with Conspiracy to Distribute Methamphetamine, 21 U.S.C. § 846, Possession with Intent to Distribute Methamphetamine, 21 U.S.C. § 841(a)(1), Use of a Communication

Facility to Commit a Drug Trafficking Crime, 21 U.S.C. § 834(b), and Distribution of Methamphetamine, 21 U.S.C. § 841(a)(1). The cause proceeded to jury trial before the Honorable J. Thomas Marten, United States District Judge in the United States District Court, District of Kansas.

Pingry testified about his dealings with Hinson and the controlled buy. Pingry said that he was introduced to Hinson by Oscar Gonzalez, Pingry's former dealer. Pingry was originally charged with six counts but pleaded guilty to only two – possession of a controlled substance with intent to distribute and possession of a firearm by a known drug user. He was sentenced to 63 months. Pingry's sentence was amended to time served. Pingry said that he received no benefit and had been promised nothing for his cooperation in the prosecution of Hinson. However, immediately following Hinson's trial, the assistant United States Attorney filed a motion for a sentence modification under Rule 35(b). Pingry claimed that the methamphetamine and the regular marijuana found during the search of his home were purchased from Hinson. The "killer bud" was for his personal use.

Detective Sarah Hamilton testified that during the course of her investigation she heard that a white male named Kevin was Pingry's supplier of methamphetamine. Hamilton said that she had heard that Kevin was Pingry's supplier at least a year before she met Pingry. Hamilton explained that she was inclined to believe drug dealers who identify other dealers,

because people typically do not admit to illegal activity unless they are guilty.

The government presented evidence showing that Hinson did not file a tax return from 2001 to 2005. The only transactions documented for those years were non-employee compensation income of $4,038, a cash transaction record indicating that Hinson paid $17,410 to Mid-American Auto Auction, and interest income of $11.

Lindsey Wilson testified that she agreed to include Hinson on her cell phone plan, which would not require a separate contract, and in exchange Hinson paid one half of her cell phone bill. The parties stipulated to the admission of Hinson's telephone records pertaining to the phone number obtained by Wilson for Hinson from May 1st, 2005 to November 16th, 2005. During that time period there were 248 calls between Pingry and Hinson. During the same period there were 216 calls between Oscar Gonzalez and Hinson.

In his defense, Hinson testified that he sold marijuana, including "killer bud," but never sold methamphetamine. Hinson owned a clothing store from 1998 to 2000. He also worked at a car dealership for six months and met many people who bought and sold cars for wholesale. Hinson began buying and selling cars and dune buggies, typically engaging in cash transactions. On one occasion, Hinson purchased some jewelry at an auction and was able to sell the jewelry on consignment for a $6,000 profit. Hinson

had documentation regarding the dune buggy and jewelry sales.

Hinson sold regular marijuana and "killer bud" to Pingry. Pingry typically would purchase four ounces of "killer bud" and referred to this as "my usual." Pingry once purchased two pounds of commercial marijuana for his father, and from then on when making such purchases he would ask "Can I get a couple for my dad?" Using his phone records detailing the calls to and from Pingry on particular dates, Hinson testified as to various transactions occurring around the time of the controlled buy. On November 5th, 2005, Hinson sold Pingry four ounces of "killer bud." On November 10th, 2005, Hinson sold Pingry two pounds of regular marijuana.

Hinson testified that on November 16th, 2005, Pingry called him at 9:14 a.m. and wanted to meet Hinson to talk. They met at O'Reilly's Auto Parts store. Pingry wanted to know what Hinson would charge him for one ounce of "killer bud," and Hinson told him that it would cost $300. Hinson told Pingry to call him later and they would do the deal. At 2:05 p.m., Hinson received a call from Pingry saying that he wanted "one" and to meet him at the auto parts store. Hinson arrived at the store where the two men had met earlier and saw Pingry standing at the back of his car looking in the trunk. Hinson got out of his truck to talk to Pingry, but then noticed that Pingry had moved to the passenger's side door of Hinson's truck, where Pingry gave Hinson $300, and Hinson handed Pingry the marijuana.

Hinson testified that when he was arrested on December 14th, 2005, he had roughly $40,000 with him, because he was on his way to the auto auction. In his previous experience with buying and selling cars wholesale, Hinson found that the ability to provide a seller with cash enabled him to negotiate much better deals.

During cross-examination, Hinson asserted his Fifth Amendment right not to incriminate himself when asked questions pertaining to his marijuana dealings. Hinson refused to provide the telephone numbers of his suppliers. The court directed Hinson to answer and reminded him that he was under oath.

The jury returned guilty verdicts on all counts. On March 3rd, 2008, the court sentenced Hinson to concurrent terms of 240 months on counts 1,2, and 4 of the Superseding Indictment and to 48 months on count 3.

REASONS FOR GRANTING THE PETITION

THE TENTH CIRCUIT COURT OF APPEALS FOUND THAT THE EVIDENCE VIOLATED HEARSAY RULES AND SHOULD NOT HAVE BEEN ADMITTED, BUT THAT THE ERROR IN ADMITTING THIS EVIDENCE WAS NOT PLAIN ERROR. THIS COURT SHOULD REVIEW THIS DECISION, IN LIGHT OF THE COURT'S RECENT RULING IN *CRAWFORD*, AND BECAUSE THE EVIDENCE ADMITTED AFFECTED THE CONSTITUTIONAL RIGHT OF THE ACCUSED TO CONFRONT THE WITNESSES AGAINST HIM.

The Circuit Court agreed that the admission of the evidence violated the hearsay rules and was error.

> Hinson argues that admission of this statement violated the hearsay rules. **We agree.** The government argues that this testimony was admissible to provide the jury with background information about the police's investigation of the defendant. However, "[a] prosecutor cannot justify the receipt of prejudicial, inadmissible evidence simply by calling it 'background' or 'context' evidence." *United States v. Benitez-Avila*, 570 F.3d 364, 369 (1st Cir. 2009). Out-of-court statements can be admitted as background for an investigation only if they provide information that is necessary to explain the government's subsequent actions, and it is not likely that the jury will "consider the statement[s] for the truth of what was stated with significant resultant prejudice," *United*

> *States v. Cass*, 127 F.3d 1218, 1223-24 (10th Cir. 1997) (citations and quotations omitted).

However, the Court found that the district court's error in admitting the evidence did not rise to the level of "plain error."

> We cannot say that the admission of Detective Hamilton's hearsay testimony affected the outcome of Hinson's trial. In addition to Hamilton's statement that she had heard a man named Kevin was Pingry's supplier, Pingry himself testified that Hinson was his supplier, and his testimony was corroborated by evidence produced during a controlled buy. It is unlikely that the officer's additional statements on this issue had any serious impact on the outcome of the trial, so any error in the admission of this evidence did not affect Hinson's substantial rights. *See Schene*, 543 F.3d at 640-41 (concluding that "error in admitting the testimony was not plain" in part because "the jury had already heard similar testimony from [another witness], and the other evidence of [defendant's] guilt was substantial"); *United States v. Rackstraw*, 7 F.3d 1476, 1482 (10th Cir. 1993) (concluding that admission of evidence did not "affect defendant's substantial rights" because "other strong evidence of his guilt was introduced at trial").

The admission of testimonial hearsay at trial, absent the unavailability of the declarant and a prior opportunity for cross-examination by the defendant, violates the defendant's Sixth Amendment right to

confrontation. *United States v. Summers*, 414 F.3d 1287, 1298-99 (10th Cir. 2005) citing *Crawford v. Washington*, 541 U.S. 36 (2004). "A statement is testimonial in nature if a reasonable person in the position of the declarant would objectively foresee that his statement might be used in the investigation or prosecution of a crime." *Summers*, 414 F.3d at 1302. An informant knows that his statement might be used in the prosecution of a crime and makes the statement hoping to benefit from his cooperation.

The government's case depended on the credibility of a snitch, Mac Pingry, and was on shaky ground. What little credibility Pingry may have possessed is dashed by the knowledge that he was granted time served on a Rule 35(b) motion immediately after Hinson's trial. To bolster Pingry's testimony and to shore up a weak case, the government elicited hearsay evidence in violation of Hinson's Sixth Amendment right to confront and cross-examine his accusers.

The defendant failed to object to the admission of this evidence at trial, and therefore the Circuit Court ruled that it would only reverse the conviction if that error affected the defendant's "substantial rights." The Court went on to rule that "a defendant generally must show 'that the error . . . affected the outcome of the district court proceeding.'" *United States v. Gonzalez-Huerta*, 403 F.3d 727, 732 (10th Cir. 2005), quoting *United States v. Cotton,* 535 U.S. 625, 632, 122 S.Ct. 1781 (2002). The Circuit Court could not say that the testimony affected the outcome of Hinson's trial.

Hinson contends that there is no way to determine whether or not the testimony of a witness in fact affected the outcome of a trial, and that the proper analysis would be whether or not the admission of the evidence affected a substantial right of the defendant, which in this case would be his Constitutional Right of confrontation and cross-examination. All of the evidence against Hinson was bolstered by the hearsay statement offered by the government through Detective Hamilton. The evidence should not have been admitted, and the error lies in its admission rather than its probable or possible impact on the case.

By admitting that statement into evidence, Hinson was denied his Constitutional Right of confrontation guaranteed him under the Sixth Amendment. The evidence was testimonial in nature, and was being offered for the truth of the matter asserted, rather than as background evidence. The circuit court correctly ruled that the evidence was being offered to "bolster the government's claim that Hinson was, in fact, Pingry's drug supplier. That purpose is impermissible, and this evidence should not have been admitted."

The circuit court went further, stating that the United States Attorney should not have sought to introduce this evidence at all. Hinson additionally relies upon this finding by the circuit court as evidence that this error affected the defendant's substantial rights and did affect the outcome of the

trial by bolstering the credibility of the government's otherwise suspect snitch testimony.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Tenth Circuit Court of Appeals.

Respectfully submitted,

LAW OFFICE OF FALK & COTTON, P.A.

ROGER L. FALK
Attorney for Petitioner
301 West Central Avenue
Wichita, Kansas 67202
Telephone: (316) 265-5115
Facsimile: (316) 265-5183

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. KEVIN L. HINSON, Defendant-Appellant.	No. 08-3086

Appeal from the United States District Court for the District of Kansas (D.C. No. 6:07-CR-10076-JTM-1)

(Filed Nov. 3, 2009)

Roger Falk of Law Office of Roger L. Falk & Associates, Wichita, Kansas (Melanie S. Morgan of Morgan Pilate LLC, Olathe, KS, with him on the brief) for Defendant-Appellant.

James Brown, Assistant United States Attorney, Wichita, Kansas (Marietta Parker, Acting United States Attorney, Wichita, Kansas, and Brent I. Anderson, Assistant United States Attorney, Wichita, Kansas, on the brief) for Plaintiff-Appellee.

Before **LUCERO**, **EBEL**, and **TYMKOVICH**, Circuit Judges.

EBEL, Circuit Judge.

Defendant-Appellant Kevin Hinson challenges his conviction and sentence for four counts of methamphetamine distribution-related offenses. Hinson argues that the district court committed plain error by admitting evidence discovered during a search of his automobile, by allowing a police detective to introduce hearsay testimony, by admonishing the defendant that he was under oath while he was testifying, and by wrongly calculating the amount of drugs to attribute to Hinson for sentencing purposes.

We exercise jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742 and AFFIRM the judgment and sentence of the district court.

I. Background

This case began in the course of an investigation of Mac Pingry, a suspected drug dealer. In connection with that investigation, the police executed a search warrant on Pingry's residence in November 2005. At his residence, they discovered 27.88 grams of methamphetamine, two pounds of regular marijuana, and a quarter pound of high-grade marijuana (referred to in the record as "killer bud"). After being taken into

custody, Pingry told the police that he had obtained the methamphetamine and the two pounds of regular marijuana from Mr. Hinson. In an attempt to improve his predicament, he also told them that he would be willing to assist them in conducting a controlled buy. A few days later, the police arranged for Mac Pingry to conduct a controlled buy from Mr. Hinson.

A. The Controlled Buy

On the day of the controlled buy, Pingry called Hinson and asked him "just for one," which, in the code they had developed over months of working together, signaled to Hinson that Pingry wanted a quarter pound of "ice," or high-grade methamphetamine.[1] The police gave Pingry $3,250, which was the standard amount he paid for a quarter pound. Pingry and his car were thoroughly searched to ensure there were no other drugs or money present, and both his car and his person were wired with surveillance equipment. After ensuring that Pingry had no drugs on his person or in his car, or any money other than the $3,250 given to him by the police for purposes of the controlled buy, the police escorted Pingry to his car. The police then watched Pingry drive to the auto

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[1] Hinson admits to having that conversation with Pingry, but testified that "just one" referred to one ounce of "killer bud." That testimony was implausible, however, because immediately after Pingry conducted the controlled buy, he was searched and found to be in possession of a quarter pound of methamphetamine but no marijuana.

parts store where he had arranged to meet Hinson. Pingry did not make any stops or meet with anyone between the time he left the police station and the time he arrived at the auto parts store for his meeting with Hinson.

Upon arriving at the auto parts store, Pingry exited his car, opened the trunk, and acted as though he were looking for something inside. Mr. Hinson then pulled up next to Pingry in a white pickup truck. Pingry got into Hinson's truck and, while in the truck, his wire picked up a discussion between Pingry and Hinson regarding the quality of the drugs he was buying. After Pingry returned to his car, he was under continual surveillance. He did not make any stops or encounter anyone else before he returned to a pre-arranged meeting spot. He could not, therefore, have received any drugs from anyone other than Mr. Hinson. When he arrived at the pre-arranged meeting spot, the police entered Pingry's car, where they discovered a quarter pound of methamphetamine. They subsequently drove to the police station, where Pingry and his car were thoroughly searched again. The police found no other drugs on him, and the buy money they had provided was gone.

B. The Police Arrest and Indict Mr. Hinson

Apparently hoping to investigate further, the police did not immediately arrest Hinson. About a month later, they sought to have Pingry conduct another controlled buy from Hinson, but Pingry

refused to participate. Realizing that they would be unable to convince Pingry to conduct additional buys, the police resolved to arrest Hinson. Choosing to forgo the "burden" of obtaining a search warrant for Hinson, the police decided they would simply follow his car until he committed a traffic offense and then arrest him. One officer testified that his instructions were to observe Mr. Hinson and "if we observed a traffic violation where we can stop him to make contact with him and to arrest him on the prior buy." (Appx. at 331.) That officer further testified that the reason the police did not just go ahead and arrest Hinson on the basis of the earlier controlled buy, and instead waited for him to commit a traffic violation, was that the police were not sure they had properly identified Hinson. Therefore, they waited until the person they thought was Mr. Hinson committed a traffic violation before stopping him.

A number of police officers were involved in following Hinson as he drove from his house on December 14, 2005. The arresting officer, Officer Dickerson, did not observe any traffic violations. At some point, however, Officer Dickerson was told that other officers had observed Hinson commit traffic violations and that he should be pulled over. Officer Dickerson pulled him over, and was soon joined by a number of other officers. After ensuring that the driver he had stopped was Mr. Hinson, Dickerson patted him down, cuffed him, and turned him over to another officer who transported him downtown. Dickerson informed the other officers at the scene

that, as he was pulling Hinson over, Hinson had dropped some sort of cloth in the back seat.

The other officers then used a canine to sniff the perimeter of the truck. Out of concern for the officers' safety, however, the police decided not to conduct a full search of the vehicle on the side of the road. Instead, they drove the truck back to the station where they conducted a thorough search. They did not find any drugs, but they did find a jacket covering a shoebox with almost $40,000 in cash (in addition to a little over $3000 that Officer Dickerson found on Hinson's person).

For a reason that is not clear in the record, the police waited another year and a half before seeking an indictment for these crimes. Hinson was eventually indicted under four counts: one count of conspiracy to distribute methamphetamine in violation of 21 U.S.C. § 841(a)(1), one count of possessing with intent to distribute methamphetamine in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2, one count of distributing methamphetamine in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2, and one count of using telephones in facilitating the knowing and intentional distribution of methamphetamine in violation of 21 U.S.C. § 843(b).

C. The Trial

At trial, the government introduced substantial evidence indicating that Hinson was Pingry's drug supplier. Pingry testified that, beginning in the spring

of 2004, he began buying anywhere from a quarter pound to a pound of methamphetamine from Mr. Hinson about 2 or 3 times a week. Overall, he said he purchased "quite a bit more than ten pounds" from Hinson. (Appx. at 144.) His testimony was corroborated by the large number of calls between Pingry and Hinson during this time period, and the large number of calls between Hinson and "Oscar," Hinson's alleged supplier. This testimony was also corroborated with evidence that the IRS had almost no record of any income for Hinson, yet he was able to buy something for $17,410 in cash from Mid-America Auto Auction in 2004, and was carrying over $40,000 in cash at the time of his arrest. In addition, Detective Hamilton testified that she began investigating the defendant after hearing, from a different confidential informant, that someone with "the name of Kevin, white male, supplied Mac Pingry with methamphetamine ice." (App. at 226.)

Hinson admitted at trial that he was a drug dealer, but claimed that he only sold marijuana, not methamphetamine. He claimed that he worked with Oscar in selling cars, not drugs. He attempted to explain his lack of reported income and the large amount of cash he carried the day of his arrest by stating that he conducted under-the-table, cash-intensive businesses such as building dune buggies and buying and selling used cars and jewelry. He stated that, on the day of his arrest, he was carrying over $40,000 in cash because he was on his way to a car auction.

The jury found Hinson guilty of all four counts. With regards to the two charges of distribution of methamphetamine, the jury was asked to determine the amount of drugs Hinson had distributed. For count 2, the jury found that Hinson had sold 40.96 grams of a mixture containing methamphetamine, which amounted to 28.01 grams of pure methamphetamine. On count 4, the jury found that Hinson had sold 112.24 grams of a mixture containing methamphetamine, or 66.93 grams of pure methamphetamine. With regards to count 1, which charged Hinson with conspiring to distribute "at least ten (10) pounds" of a mixture containing methamphetamine (Appx. at 608), the jury was not asked to specify the actual amount Hinson was guilty of conspiring to distribute.

D. The Sentence

At sentencing, neither party objected to the PSR, but the defendant sought a reduction in the PSR's calculation of his criminal history category and a sentence below the guidelines range. The district court agreed with the defendant's argument that his criminal history was over-represented, and reduced his criminal history category from VI to III. The court adopted the PSR's calculation of an offense level of 36. This calculation was based on the jury's finding that Hinson had distributed 153 grams of methamphetamine and had conspired in the distribution of at least 10 pounds (or 4.54 kilograms) more. Additionally, the PSR converted the $43,148 in cash found

in Hinson's car on the day of his arrest into an additional 1.5 kilograms of methamphetamine. The total amount of methamphetamine attributed to Hinson was, therefore, more than 5 kilograms, which corresponds with an offense level of 36. *See* U.S.S.G. § 2D1.1. Hinson's guidelines range was 235-293 months; the court sentenced him to concurrent terms of 240 months on counts 1, 2, and 4, and a concurrent term of 48 months on count 3.

II. Analysis

A. Plain Error Review

Hinson did not raise at trial any of the issues addressed on appeal, so we review his appeal for plain error. *See United States v. Schene*, 543 F.3d 627, 640 (10th Cir. 2008) (reviewing evidentiary challenge "for plain error because [the defendant] raised no contemporaneous objection"); *see also United States v. Olano*, 507 U.S. 725, 731 (1993) (stating that Fed. R. Crim. P. 52(b) "provides a court of appeals a limited power to correct errors that were forfeited because not timely raised in district court"). "Plain error occurs when there is (1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Alapizco-Valenzuela*, 546 F.3d 1208, 1222 (10th Cir. 2008).

B. The District Court Did Not Plainly Err by Admitting the Evidence Found in Hinson's Automobile

The district court did not err in admitting the evidence found in Hinson's car because the police had probable cause to arrest Hinson for his drug trafficking activity, and their search of his car incident to that arrest was justified because they had reason to think they would find evidence of that offense in his car. Further, even if the district court erred by admitting the fruits of this search, that error is not "plain" because – in light of the substantial evidence of Hinson's drug trafficking activity presented at trial – Hinson has failed to show that "but for the error claimed, the result of the proceeding would have been different." *United States v. Portillo-Vega,* 478 F.3d 1194, 1202 (10th Cir. 2007).

1. *The Police Officers Had Probable Cause to Arrest Hinson*

The police officers had probable cause to arrest Hinson based on the controlled buy they witnessed a month before his arrest as well as Pingry's statements to the police that he regularly purchased drugs from Hinson. *See United States v. Turner,* 553 F.3d 1337, 1344 (10th Cir. 2009) ("'[A] warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed.'") (quoting *Devenpeck v. Alford,* 543 U.S. 146, 152 (2004)); *see also United States v. Taylor,* 519 F.3d

832, 834 (8th Cir. 2008) (affirming district court's finding that officers had probable cause to arrest defendant primarily because of an informant's tip that was corroborated by a controlled buy). Although the controlled buy had occurred approximately a month before Hinson's arrest, the passage of time did not make that information stale or otherwise destroy the officers' probable cause. *See United States v. Jeanetta,* 533 F.3d 651, 655 (8th Cir. 2008) ("Standing alone, the fact the controlled buy was made two weeks before the warrant issued does not render the information in the application stale."). This is especially true where, as here, there is evidence that defendant's criminal activity was ongoing. *See United States v. Cantu,* 405 F.3d 1173, 1177 (10th Cir. 2005) ("When the circumstances suggest ongoing criminal activity, the passage of time recedes in importance."). Further, just a few days before police arrested Hinson, Pingry had told the police that he would be willing to set up another controlled buy with Hinson, and although he ultimately refused to follow through, his initial willingness to arrange the buy indicated that Hinson was still in the drug business. *See Cantu,* 405 F.3d at 1177-78 (stating that "otherwise stale information may be refreshed by more recent events").

Nor does it matter that Officer Dickerson, the arresting officer, did not personally observe the controlled buy. Dickerson was told that his colleagues in the narcotics division had reason to stop Hinson. This court recently held "that a police officer may rely on the instructions of the DEA (or other law enforcement

agencies) in stopping a car, even if that officer himself or herself is not privy to all the facts amounting to probable cause." *United States v. Chavez*, 534 F.3d 1338, 1347 (10th Cir. 2008). Thus, the fact that Dickerson was not personally aware of the basis for the probable cause for Hinson's arrest is irrelevant because the officers instructing him to make the arrest had probable cause for the arrest.

Because we hold that Hinson's arrest was justified by the evidence of his drug trafficking activities, we need not and do not address whether his arrest was also justified due to his alleged traffic violations.

2. *The Police Were Justified in Searching Hinson's Car Incident to His Arrest*[2]

The police were justified in searching Hinson's car incident to his arrest because it was "reasonable" for the officers "to believe evidence relevant to the crime of arrest might be found in the vehicle." *Arizona v. Gant*, 129 S. Ct. 1710, 1719, 1723 (2009) (holding that "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe

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[2] Hinson does not contest that, if his arrest was permissible, the subsequent search of his person was justified. *See United States v. McKissick*, 204 F.3d 1282, 1296 (10th Cir. 2000) ("[O]fficers may conduct a warrantless search of a person when it is incident to a lawful arrest of that person.") (citations and quotations omitted).

the vehicle contains evidence of the offense of arrest") (citations and quotations omitted). The police had previously arranged a controlled buy where Hinson sold drugs to Pingry out of the very vehicle he was driving at the time of his arrest. Further, Pingry testified that Hinson would often deliver drugs to him. Thus, it was eminently reasonable for the officers to believe they would find evidence relevant to Hinson's drug trafficking offenses in his truck.

Alternatively, the police were justified in searching the contents of Hinson's truck after bringing the truck back to the police station. The police did not search Hinson's truck on the side of the road. Rather, they waited until the truck was at the station to search its contents, and Hinson does not argue that the police were unjustified in taking his truck to the station. Their subsequent search of the contents of his car was, therefore, justified as an inventory search. *See United States v. Tueller,* 349 F.3d 1239, 1243 (10th Cir. 2003) ("It is common practice for the police to conduct an inventory of the contents of vehicles they have taken into their custody or are about to impound. Such inventories are now a well-defined exception to the warrant requirement of the Fourth Amendment.") (citations and quotations omitted).

3. *Any Error in Admitting this Evidence Did Not Affect the Outcome of the Trial*

Even if the district court erred by admitting evidence of the cash that Hinson was carrying at the

time of his arrest, there is no reason to think that this evidence affected the outcome of this proceeding. To demonstrate that any error in the admission of this evidence amounted to plain error, Hinson "must demonstrate the error 'affected the outcome of the district court proceedings.'" *Portillo-Vega,* 478 F.3d at 1202 (quoting *United States v. Gonzalez-Huerta,* 403 F.3d 727, 732-33 (10th Cir. 2005)). Given the other evidence the jury heard of Hinson's drug-trafficking activities – testimony that Hinson was Pingry's main supplier, testimony and physical evidence of a controlled buy in which Pingry purchased a quarter pound of methamphetamine from Hinson, and Hinson's own admission that he sold drugs, albeit not methamphetamine – it is highly unlikely that the jury was particularly swayed by the fact that, at the time of his arrest, Hinson was carrying a large amount of cash. The admission of that money into evidence, even if erroneous, does not rise to the level of plain error.[3]

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[3] Although this evidence did not affect the outcome of Hinson's trial, it significantly affected the district court's determination of Hinson's sentence. However, even if this evidence was inadmissible at trial, it was still appropriate to rely on that evidence at sentencing. The exclusionary rule does not bar the admission of the fruits of an illegal search at sentencing unless the illegal search was conducted with the intent to obtain evidence that would increase the defendant's sentence. *See United States v. VanDam,* 493 F.3d 1194, 1198 n.2 (10th Cir. 2007) ("[E]vidence obtained through an illegal search and seizure may be introduced at sentencing, unless the evidence was illegally gathered with the intent to secure an increased sentence.").

(Continued on following page)

C. The District Court Did Not Plainly Err by Admitting Detective Hamilton's Hearsay Testimony that She Had Heard Hinson Was Pingry's Drug Supplier

Detective Hamilton testified at Hinson's trial that she began investigating Mac Pingry based on her suspicion that he was selling drugs, and how that investigation eventually led to the defendant, Kevin Hinson. Early in her testimony she stated that, while investigating Mac Pingry, she "also heard the name of Kevin as being someone who actually supplied Mac Pingry with his methamphetamine ice, that was then distributed to the individual that [she] was initially investigating." (Appx. at 226.) She continued to explain how she built her case against Pingry and affirmed that Pingry's "initial interview with [her colleague] Detective Real confirm[ed her] earlier investigation that Mr. Pingry's source of supplies was a person by the name of Kevin." (Appx. at 232.) Further, that interview revealed that the "Kevin" she had heard about earlier was Kevin Hinson, the defendant.

Hinson argues that admission of this statement violated the hearsay rules. We agree. The government argues that this testimony was admissible to provide the jury with background information about the

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There is no evidence that the officers in this case intended to wrongfully obtain this evidence in order to increase Hinson's sentence, so there was no error in considering that evidence at sentencing.

police's investigation of the defendant. However, "[a] prosecutor cannot justify the receipt of prejudicial, inadmissible evidence simply by calling it 'background' or 'context' evidence." *United States v. Benitez-Avila*, 570 F.3d 364, 369 (1st Cir. 2009). Out-of-court statements can be admitted as background for an investigation only if they provide information that is necessary to explain the government's subsequent actions, and it is not likely that the jury will "consider the statement[s] for the truth of what was stated with significant resultant prejudice," *United States v. Cass*, 127 F.3d 1218, 1223-24 (10th Cir. 1997) (citations and quotations omitted).

In deciding whether an out-of-court statement is admissible to provide background for an investigation, this court firsts asks if this out of court statement is hearsay.

1. *Detective Hamilton's Statements Were Hearsay Because They Were Offered for Their Truth, Not for Relevant Background*

"Under Fed. R. Evid. Rule 801(c), 28 U.S.C.A., hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *United States v. Freeman*, 816 F.2d 558, 563 (10th Cir. 1987). "Testimony which is not offered to prove the truth of an out-of-court statement, but is offered instead for *relevant* context or background, is

not considered hearsay." *United States v. Becker,* 230 F.3d 1224, 1228 (10th Cir. 2000) (emphasis added). Thus, this court affirmed the admission of a police officer's testimony describing an informant's statements that the defendant would be distributing some counterfeit money at a certain location to explain why the police had that location under surveillance when that exchange took place. *See Freeman,* 816 F.2d at 560, 563. Similarly, this court affirmed the admission of an officer's testimony that he had received information that drugs were being sold from a certain address – but not the identity of the person allegedly selling those drugs – as background information explaining why the police conducted a controlled buy at that address. *See United States v. Wilson,* 107 F.3d 774, 781 (10th Cir. 1997).

However, in *Becker,* this court held that the district court erred by admitting an officer's testimony that an informant had told him the defendant was selling and manufacturing drugs, where that information went "to precisely the issue the government was required to prove" and "the government clearly relied on the informant's statements as truthful," as evidenced by the government's reference to that information in its closing arguments. 230 F.3d at 1229 (citations and quotations omitted). Similarly, in *Cass,* this court held that statements ostensibly offered as background were, in fact, inadmissible hearsay because of "the extensive admission of [the] out-of-court statements, the fact that [the] evidence went directly to the defendant's guilt, and the [fact

that the government used this] evidence to establish the truth of the matters asserted." 127 F.3d at 1224.

Ascertaining the purpose evidence serves, while essential to a determination of whether it constitutes inadmissible hearsay or admissible background information, is not an easy task. One useful clue that courts have looked to is whether the purported background evidence is necessary for the government to be able to tell a coherent story about its investigation. *See United States v. Reyes,* 18 F.3d 65, 70-72 (2d Cir. 1994) (holding that hearsay evidence ostensibly used to explain the officers' focus on the defendant in that case was inadmissible because "[e]ven if there had been sufficient reason to explain to the jury why the agent investigated [the defendant], that explanation was amply provided" with other, admissible, evidence); *United States v. Sallins,* 993 F.2d 344, 346-47 (3rd Cir. 1993) (reversing defendant's conviction based on the introduction of inadmissible hearsay evidence – ostensibly admitted as background – of radio call to police in part because the police could have adequately explained their reasons for investigating the defendant without invoking this hearsay evidence). In this case, the "background" evidence offered by Detective Hamilton was entirely unnecessary to explain the context of the police investigation of Hinson. The reason the police focused their investigation on Hinson was perfectly clear: After arresting Pingry, he told the police that Hinson was his supplier. The government offered ample admissible evidence to show that this conversation took place, and Detective Nicholson's

testimony that she had heard that someone named "Kevin" was Pingry's supplier was, therefore, completely unnecessary to explain the police's subsequent actions. Where the government introduces evidence that bears on the ultimate issue in a case but that is not necessary to explain the background of a police investigation, the only reasonable conclusion we can reach is that the evidence was offered, not as background, but as support for the government's case against the defendant. As the Third Circuit stated under very similar circumstances, "[t]he absence of a tenable non-hearsay purpose for offering the [hearsay evidence] *establishes that the evidence could have been offered only for its truth value.*" *Sallins,* 993 F.2d at 347 (emphasis added). Here too, the only purpose Hamilton's hearsay testimony served was to bolster the government's claim that Hinson was, in fact, Pingry's drug supplier. That purpose is impermissible, and this evidence should not have been admitted.

Nor should this evidence have been offered by the prosecution. This court has previously criticized the "'apparently widespread abuse'" of the background exception to the hearsay rule, although not in the particular context of the Kansas U.S. Attorney's Office. *Cass,* 127 F.3d at 1223 (quoting 2 *McCormick on Evidence* (4th ed.) § 249, at 104). We do not suggest that the problem is any more pronounced in the Kansas U.S. Attorney's Office than elsewhere, but we wish to remind all U.S. Attorney's Offices that, the Supreme Court stated more than seventy years ago, the U.S. Attorney "is the representative not of an

ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States,* 295 U.S. 78, 88 (1935).[4]

2. *The District Court's Error in Admitting This Evidence Did Not Rise to the Level of "Plain Error"*

Where a defendant fails to object to the admission of testimony at trial, we will only reverse his conviction if that error affected the defendant's "substantial rights." *See United States v. Cotton,* 535 U.S. 625, 631 (2002) (stating that a court may only "correct an error not raised at trial" if that error affected the defendant's "substantial rights") (citations and quotations omitted). To satisfy this prong of the plain error analysis, a defendant generally must show "that the error . . . affected the outcome of the district court proceeding." *Gonzalez-Huerta,* 403 F.3d at 732 (quoting *Cotton,* 535 U.S. at 632); *see also Olano,* 507 U.S. at 734 ("In most cases, a court of appeals cannot correct [a] forfeited error unless the defendant shows

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[4] While the prosecution's introduction of inadmissible hearsay evidence may not rise to the level of egregiousness that prompted the Court's admonition in *Berger,* prosecutors' frequent efforts to introduce inadmissible evidence suggests that the important message contained in *Berger* is being forgotten.

that the error was prejudicial."); *Portillo-Vega*, 478 F.3d at 1202 ("In order to satisfy the third prong of plain error review, [the defendant] . . . must show a reasonable probability that, but for the error claimed, the result of the proceeding would have been different." (citations and quotations omitted)).

We cannot say that the admission of Detective Hamilton's hearsay testimony affected the outcome of Hinson's trial. In addition to Hamilton's statement that she had heard a man named Kevin was Pingry's supplier, Pingry himself testified that Hinson was his supplier, and his testimony was corroborated by evidence produced during a controlled buy. It is unlikely that the officer's additional statements on this issue had any serious impact on the outcome of the trial, so any error in the admission of this evidence did not affect Hinson's substantial rights. *See Schene*, 543 F.3d at 640-41 (concluding that "error in admitting the testimony was not plain" in part because "the jury had already heard similar testimony from [another witness], and the other evidence of [defendant's] guilt was substantial"); *United States v. Rackstraw*, 7 F.3d 1476, 1482 (10th Cir. 1993) (concluding that admission of evidence did not "affect defendant's substantial rights" because "other strong evidence of his guilt was introduced at trial").

D. The District Court Did Not Plainly Err by Admonishing Defendant That He Was Under Oath While Defendant Was on the Witness Stand

At trial, Hinson took the stand in his own defense. On direct, Hinson discussed his phone records. In particular, he described phone calls that took place between him and Mac Pingry, and even identified specific entries in his phone records that represented phone calls between him and Pingry. He also testified that, at the controlled buy, he sold Pingry marijuana, not methamphetamine.

On cross, the government probed for more details about Hinson's admitted marijuana-selling. During that line of questioning, the government asked Hinson what his drug dealer, "Javier's", phone number was. Hinson replied, "I can't recall right now." (Appx. at 542.) A bit later, after identifying another dealer he worked with named "John", the government asked if Hinson, who had his phone records in front of him, could "find John and Javier's phone number[s]." (Appx. at 549.) Hinson replied, "I can't recall which one. There are a lot of phone numbers." (App. at 549.) Just a little later on in his testimony, Hinson was explaining how he was able to identify which call in his phone records had come from Mac Pingry the morning of the controlled buy. He testified that Pingry had called him from an unfamiliar pay phone and stated, "that would be the only number that I don't recognize on that day. . . ." (Appx. at 553.) The

government lawyer immediately saw an impeachment opportunity, and the following colloquy took place:

> Q: Yet you looked through the phone records and you can't find Javier's number or John's number, can you?
>
> A: I'm not going to give you [either drug dealer's] number, to be honest with you.
>
> Lawyer: Your Honor, [I] ask you to order the witness to answer the question.
>
> Court: Mr. Hinson, you need to answer the question. Mr. Watson asked for the numbers. You said you couldn't locate it. You have now indicated that you're not going to answer the question.
>
> Witness: I don't recall what numbers he had, sir.
>
> Court: Well, now you tell me, Mr. Hinson: What is your answer? Are you telling Mr. – you said under oath you're not going to give Mr. Watson their numbers "to be honest with you." I think that was your statement.
>
> Witness: Yes sir.
>
> Court: What is your testimony, reminding you that you're under oath?
>
> Witness: I can't find the numbers in there. I don't recognize which ones. There's a lot of phone calls, and that was in 2005.
>
> Court: All right.

(*Id.* at 553-54.) Hinson argues that the district court committed plain error by interjecting and reminding Hinson he was under oath, thus suggesting that Hinson was not telling the truth.

We disagree. This colloquy reveals nothing untoward about the judge's admonition to the witness that he was under oath or his ultimately successful effort to elicit a clear response from the witness. This court has previously commented that a district court may question a witness in order "to develop material clarification. For this purpose, the presiding judge has not only the power but the duty to elicit the truth." *Moore v. Strong,* 360 F.2d 71, 77 (10th Cir. 1966). The judge in this case did not exceed that power. Hinson had contradicted his earlier statement that he could not find his dealers' numbers by stating that he would not give the prosecutor those numbers. The judge's attempt to clarify the truth – whether Hinson was *unable* or simply *unwilling* to identify his dealers' numbers – did not add any new information. The jury could tell, from listening to this testimony, that the witness had offered contradictory statements. Any further implication of dishonesty from the judge did not prejudice the defendant or materially implicate his credibility before the jury. *See generally United States v. Nickl,* 427 F.3d 1286, 1293 (10th Cir. 2005) ("A judge 'may analyze and dissect the evidence, but he may not either distort it or add to it.'") (quoting *Quercia v. United States,* 289 U.S. 466, 470 (1933)).

Further, "[i]t is entirely proper – and often times it is imperative – that a witness be cautioned about the consequences of an oath." *United States v. Vosper,* 493 F.2d 433, 436 (5th Cir. 1974). In *United States v. Greer,* 806 F.2d 556 (5th Cir. 1986) (*per curiam*), the Fifth Circuit addressed circumstances similar to those in this case. The prosecution was persisting along a line of questioning and, after repeating the same answer a few times, the witness asked "if the prosecution wanted the truth." *Greer,* 806 F.2d at 559. At that point the court interjected with a reminder that the witness was under oath. The Fifth Circuit found that, in that context, the judge's brief admonition "was limited and appropriate." *Id.* The same is true of the judge's statements to Hinson in this case.[5]

Further, even if there were error, which we conclude there was not, to prove that any error was "plain" the challenging party must prove "that, but for the error claimed, the result of the proceeding would have been different." *Portillo-Vega,* 478 F.3d at

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[5] The cases that Hinson cites in support of his claim that the district court acted inappropriately in this case all involve far more egregious and prejudicial statements than the statements made in this case. *See, e.g., Quercia,* 289 U.S. at 471-72 (holding that trial judge committed reversible error by telling the jury that it was a "fact" that defendant's mannerism, wiping hands while testifying, "was almost always an indication of lying"); *Nickl,* 427 F.3d at 1292-93 (holding that trial judge committed reversible error by stating that he was firmly convinced the defendant had acted intentionally, an essential element of the offense she was charged with, where the defendant had offered conflicting testimony on that issue).

1202. Hinson has not carried that burden here. First, this colloquy did not implicate an issue central to the resolution of the merits of the case. Second, the judge instructed the jury that they were the "sole judges of the credibility or 'believability' of each witness." (App. at 617.) That instruction was sufficient to cure any prejudice resulting from the judge's admonition that the defendant was under oath in this case. *See United States v. Sanders*, 928 F.2d 940, 942 (10th Cir. 1991) (noting that "a limiting instruction" will "presumptively cur[e] any prejudicial impact on defendant").

E. The District Court Did Not Plainly Err in Calculating the Amount of Drugs Attributed to Hinson for Sentencing Purposes

At sentencing, the district court relied, without objection, on the pre-sentence report's ("PSR's") calculation of Hinson's offense level. The PSR calculated Hinson's offense level by adding the 153 grams of methamphetamine the jury attributed to Hinson for counts two and four, to the 10 pounds, or 4.54 kilograms based on Hinson's conviction for conspiracy to distribute at least 10 pounds of methamphetamine under count one, and adding an additional 1.5 kilograms by converting the $43,148 in cash found in Hinson's car and on his person on the day of his arrest into an equivalent amount of methamphetamine. Hinson argues that the court should have determined his sentenced based only on the 153 grams specifically attributed to him by the jury.

We disagree. The jury convicted Hinson not only of possessing and distributing the 153 grams of methamphetamine attributed to Hinson based on count two of the indictment, but also, under count one of the indictment, of conspiracy to distribute at least 4.54 kilograms of methamphetamine. We fail to understand the basis for Hinson's objection to the district court's reliance, for sentencing purposes, on the jury's conclusions that Hinson was responsible for these drugs. Similarly, although we comprehend Hinson's argument that there was insufficient evidence to support the court's conversion of the $43,148 into its methamphetamine equivalent, we reject that argument. The evidence at trial demonstrated that Hinson was a long-term methamphetamine dealer who sold drugs out of his car. Further, Pingry testified that he sometimes saw Hinson throw drug money in boxes in his car, thus providing a specific evidentiary link between the money found in a box in Hinson's car and Hinson's drug activity. Under these circumstances we cannot say that the district court committed plain error by concluding that the cash found in Hinson's car was drug money that should be converted into its methamphetamine equivalent for sentencing purposes. *See United States v. Jarvi,* 537 F.3d 1256, 1263 (10th Cir. 2008) ("The guidelines provisions for related conduct allow a drug offender to be sentenced for cash 'in a case where cash is seized and where either no drug is seized or the amount seized does not reflect the scale of the offense . . . provided the court finds by a preponderance that the cash is attributable to drug sales which were part of

the same course of conduct or common scheme or plan as the conviction count.'") (quoting *United States v. Rios*, 22 F.3d 1024, 1028 (10th Cir. 1994) (ellipses in original)).[6]

III. Conclusion

For the foregoing reasons, we AFFIRM Hinson's conviction and sentence.

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[6] We also reject Hinson's argument that, following the Supreme Court's decision in *Gall v. United States*, 552 U.S. 38 (2007), this court should insist that facts contributing to a defendant's sentence be found beyond a reasonable doubt. This court has already stated, post-*Gall*, that the standard remains proof by a preponderance of the evidence. *See United States v. Tindall*, 519 F.3d 1057, 1063 & n.2 (10th Cir. 2008) (citing *Gall* and noting that facts found for sentencing purposes need only be found by a preponderance of the evidence); *see also United States v. Gambino-Zavala*, 539 F.3d 1221, 1228 (10th Cir. 2008) (citing *Tindall* for the proposition that "[t]he government has the burden of proving by a preponderance of the evidence any findings necessary to support a sentence enhancement").

United States District Court
District of Kansas

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
v.	(Filed Mar. 13, 2008)
KEVIN L. HINSON	Case Number: 6:07CR10076-001
	USM Number: 19753-031
	Defendant's Attorney James D. Turner

THE DEFENDANT:

☐ pleaded guilty to count(s): _____.

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☒ was found guilty on count(s) 1, 2, 3, and 4 of the Superseding Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. § 846	Conspiracy to Distribute Methamphetamine	01/12/06	1
21 U.S.C. § 841(a)(1)	Possession With Intent to Distribute Methamphetamine	11/10/05	2
21 U.S.C. § 843(b)	Use of a Communication Facility to Commit a Drug Trafficking Crime	11/16/05	3

21 U.S.C. § 841(a)(1)	Distribution of Methamphetamine	11/16/05	4

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____.

☒ Count(s) Ct. 1 of the Indictment (is)(are) dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of material changes in economic circumstances.

03/03/08
Date of Imposition of Judgment

s/ J. Thomas Marten
Signature of Judge

Honorable J. Thomas Marten,
U. S. District Judge
Name & Title of Judge

March 12, 2008
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 240 months.

Counts 1, 2 and 4-240 months, each count, said terms to run concurrently with each other.
Count 3: 48 months, said term to run concurrently with Counts 1, 2 and 4.

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district.

- ☐ at _____ on _____ .
- ☐ as notified by the United States Marshal.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ before _____ on _____.
- ☒ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Officer.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years .

Counts 1 and 4-5 years, each count, said terms to run concurrently with each other.
Count 2-4 years, said term to run concurrently with Counts 1 and 4.
Count 3-1 year, said term to run concurrently with Counts 1, 2 and 4.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance.

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant is prohibited from possessing or purchasing a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register as a sex offender, and keep the registration current, in each jurisdiction where the defendant resides, where the defendant is an employee, and where the defendant is a student. For initial registration purposes only, the defendant shall also register in the jurisdiction in which convicted, if such jurisdiction is different from the jurisdiction of residence. Registration shall occur not later than 3 business days after being sentenced, if the defendant is not sentenced to a term of imprisonment. The defendant shall, not later than 3 business days after each change in name,

residence, employment, or student status, appear in person in at least one jurisdiction in which the defendant is registered and inform that jurisdiction of all changes in the information required. (Check if applicable)

☐ The defendant shall participate in an approved program for domestic violence. (Check if applicable)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substances or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law

enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall successfully participate in an approved program for substance abuse, which may include drug/alcohol testing, counseling, and inpatient treatment, and share in the costs, based on the ability to pay. The defendant shall abstain from the use of alcohol during said treatment program.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the total criminal monetary penalties under the Schedule of Payments set forth in this Judgment.

	Assessment	Fine	Restitution
Totals:	$ 400	$	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(I), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Totals:	$ _	$ _	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options set forth in this Judgment may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

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* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for the
☐ fine and/or ☐ restitution.

☐ the interest requirement for the
☐ fine and/or ☐ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☐ Lump sum payment of $ due immediately, balance due

☐ not later than _____, or

☐ in accordance with ( ) C, ( ) D,( ) E, or ( ) F below; or

B ☒ Payment to begin immediately (may be combined with ( ) C, ( ) D, or (x) F below); or

C ☐ Payment in monthly installments of not less than 5% of the defendant's monthly gross household income over a period of _____ years to commence _____ days after the date of this judgment; or

D ☐ Payment of not less than 10% of the funds deposited each month into the inmate's trust fund account and monthly installments of not less than 5% of the defendant's monthly gross household income over a period of ____ years,

to commence _____ days after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

If restitution is ordered, the Clerk, U.S. District Court, may hold and accumulate restitution payments, without distribution, until the amount accumulated is such that the minimum distribution to any restitution victim will not be less than $25.

Payments should be made to Clerk, U.S. District Court, U.S. Courthouse – Room 259, 500 State Avenue, Kansas City, Kansas 66101.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount Joint and Several Amount and corresponding payee, if appropriate.

Case Number (*including Defendant Number*)	*Defendant Name*	Joint and Several *Amount*

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, (8) costs, including cost of prosecution and court costs.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

U.S.A.,

Plaintiff,

vs.

KEVIN HINSON,

Defendant.

Case No. 07-10076-01-JTM

VOLUME NO. 2

TRANSCRIPT OF JURY TRIAL PROCEEDINGS

PROCEEDINGS had on the 28th day of November, 2007, in the above-entitled and numbered cause before the HONORABLE J. THOMAS MARTEN, United States District Judge for the District of Kansas, Sitting in Wichita with a jury of twelve.

APPEARANCES

The United States of America appeared by and through BLAIR WATSON;

The Defendant appeared in person and by and through JAMES TURNER.

* * *

[224] A. Sure. We can ask. They don't always, but we have typically most of the time.

Q. Why would you want someone that you know is a drug dealer to cooperate with you?

A. Because they are going to have a dealer, and if somebody is a drug dealer and they are getting drugs from someone else, then we would want the drug dealer to cooperate so that we could get the other person who's distributing more narcotics.

Q. Why would you want to take the word of someone that is an admitted or a proven drug dealer?

A. Why would you want to take their word?

Q. Yeah. Why would you want to take their word? If they identify Blair Watson as the dealer, why would you want to take their word for that.

MR. TURNER: Speculation. Objection, speculation.

THE COURT: Overruled. I think he's asking for her personal opinion when she can talk to.

A. Well, because typically people are not going to admit to something that they don't do, especially if it will be something illegal that can get them in trouble. So if somebody tells me they are a drug dealer, and if they have personal knowledge about other activities maybe related to them, then I would be inclined to believe them. Typically people don't say they are doing something illegal when they are not.

Q. To learn about someone dealing with drugs it would take [225] someone that is dealing in drugs to know about that person?

A. Yes.

Q. In the terms of Mac Pingry, what did you do to further investigate him?

A. Well, Mac Pingry came up in an investigation that I was involved with another Federal defendant. During that investigation that person told me that their supplier was an individual named Mac. I did follow-up, identified who Mac was, which was Mr. Pingry. And during that initial investigation I also heard the name of Kevin as being someone who actually supplied Mac Pingry with his methamphetamine ice, that was then distributed to the individual that I was initially investigating.

Q. All right. You knew a connection as you started investigating Mr. Pingry with an unknown person, but a person by the name of Kevin?

A. Yes. I heard the name of Kevin, white male, supplied Mac Pingry with methamphetamine ice prior to – at least a year prior to even actually meeting and speaking with Mac Pingry.

Q. So during that year's time that you had both of those names I take it you're involved in other investigations also?

A. Yes.

Q. Tell us how that works, how you juggle your investigations to know where to point your focus?

A. Well, it can depend on day-to-day. I can have my people that I'm looking into or pursuing, and other detectives that work in [226] that section might

have someone that they are involved with. And the narcotics section works together as team. There might be a day as far as prioritizing where what I have going on is not as important or a priority as what another detective does. Not just up to me when and where I get to work my cases.

Q. While you had this information about Mac Pingry and the person by the name of Kevin being involved in methamphetamine, the fact it took sometime didn't mean you didn't believe the information then?

A. That's correct. It did not mean that, and, in fact, I was in contact with officers on the street who were trying to make a case, if you will, arrest Mac Pingry as well. Not like it was forgotten, not like I believe the information was erroneous or false.

Q. Matter of getting there?

A. That's right.

Q. Did you get there in November of 2005?

A. Yes.

Q. And how did you get there?

A. I had off a period of time. I had conducted surveillance on Mr. Pingry when he lived on the south side of town. I learned that he moved to a Kechi address there. On that day – there's a day in November where Detective Real assisted me with obtaining some information that led to a search

warrant. I obtained that, and we served it at his house.

* * *